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May 27, 2011

Felicia Orth
Acting Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room 2150-N
Santa Fe, New Mexico 87502

Re: PUBLIC COMMENT FOR EIB 11-01(R) & 11-02(R)

Dear Ms. Orth:

Please accept the following written comments for the Environmental Improvement Board's consideration regarding the New Mexico Environment Department's ("Department's") proposed plan to adopt revisions to the New Mexico State Implementation Plan ("SIP") for Regional Haze ("RH") and to make a Best Available Retrofit Technology ("BART") decision for the San Juan Generating Station ("SJGS"). These comments are submitted by undersigned counsel on behalf of Dine CARE, Natural Resources Defense Council, New Energy Economy, New Mexico Sportsman, the Rio Grande Chapter of the Sierra Club, the Sierra Club, San Juan Citizens Alliance, and WildEarth Guardians ("Conservation Groups").

The Conservation Groups and their members have a concrete interest in the ongoing operations of the SJGS and, in particular, the public health and environmental consequences of those operations, including to the National Parks and Wilderness Areas in New Mexico, the Intermountain West, and Colorado Plateau. These groups support robust, meaningful action to control, if not prevent, haze-causing pollutants from SJGS and informed choices that provide clean, affordable energy to New Mexicans. This helps fulfill the United States Congress' national goal for the Clean Air Act, the "prevention of any future, and the remedying of any existing, impairment of visibility in the mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress adopted the visibility protection program to protect the "intrinsic beauty and historical and archeological treasures" of specific public lands.[1] To achieve this goal,

[1] H.R. REP. NO. 95-294, at 203–04 (1977). These purposes, as well as the legal mechanics underlying visibility protections, are further detailed in the San Juan Citizens Alliance May 3, 2011 letter, specifically Exhibit 2 attached to that letter, submitted to the Department for inclusion in the Board's record. We have attached that letter, and its four exhibits, 1-4, to this letter as Exhibit A.

the regional haze program establishes a regulatory floor and requires states to design and implement programs at least as stringent as the national floor to curb haze-causing emissions located within their jurisdictions. SJGS is, notably, the 18th highest NOx emitting coal-fired power plant in the United States, out of 496 operating plants, according to EPA's Clean Air Markets Division website.[2]

In this context, the Department's RH SIP proposal is unacceptable. The RH SIP does not comply with the Clean Air Act and does not adequately protect against haze-causing pollution and the attendant public health and environmental impacts that this pollution causes. Instead, the RH SIP carries PNM Resources water regarding its primary and narrow interest in implementing the cheapest possible pollution control reduction technologies, with air quality improperly relegated to a position of secondary importance.

Accordingly, NMED's RH SIP proposal should be rejected and the EIB should, instead, explicitly signal its support for the Environmental Protection Agency's ("EPA") Federal Implementation Plan ("FIP") decision-making process. Put simply, EPA's FIP better protects air quality, public health, and the environment; best ensures compliance with the Clean Air Act; and makes the best and most efficient use of limited financial capital.

The Conservation Groups state in support of this position as follows:

1. NMED'S PROPOSED SIP AND BART DETERMINATION SHOULD BE REJECTED BECAUSE THEY DO NOT PROTECT CLEAN AIR AND DO NOT COMPLY WITH THE CLEAN AIR ACT

a. EPA's May 13, 2011 Letter Illuminates Deficiencies with the Department's Proposal That Were Not and Cannot be Remedied by the Department's May 20, 2011 Supplemental Testimony

On May 13, 2011, EPA submitted a letter (EPA May 13th Letter") to the Department outlining serious concerns regarding the proposed RH SIP. While some of these concerns may be fixable, EPA's letter strongly signals that there are fatal flaws with the proposed RH SIP, at least without further analysis and review that, given the late date, cannot be completed before the EIB's June 1st hearing commences. In particular, EPA noted that:

- "The Proposed SIP does not include an assessment of the number of years it would take to reach natural conditions at the rate of progress selected by the State for each Class I site," as required by 40 C.F.R. § 51.308(d)(1)(ii). EPA May 13th Letter at ¶ 3.

- The proposed RH SIP states that visibility degradation for Carlsbad Caverns is due to "over-prediction for area sources," but lacks "details or analysis of what pollutant, source category, or source region is responsible for the predicted degradation" and that, therefore, "[a]dditional technical analysis and examination of modeling results, source apportionment, and emission inventories are necessary to support the

[2] www.epa.gov/airmarkets.

conclusion that modeled is due to area sources that are being over predicted," especially since "EPA believes there may be other causes of visibility degradation at this site on the 20% best days," linking to Clean Air Act rules at 40 C.F.R. §§ 51.308(d)(1), 51.309(g).

EPA, on this basis, then states that "New Mexico must either demonstrate that the degradation is due to international emissions or demonstrate that incorrect emission projections are responsible for the predicted degradation in visibility" because, otherwise, "EPA will not be able to propose approval of New Mexico's reasonable progress demonstration." EPA May 13th Letter at ¶ 4.

- The RH SIP's fails to "identify at which specific Class I areas and to what degree visibility conditions are impacted by New Mexico" and further fails to provide a long-term strategy that "address[es] any emission reduction strategies that would reduce the impact of New Mexico emissions at any Class I area outside of the state, or provide sufficient analysis to support a conclusion that future emissions from New Mexico will not significantly impact visibility at these sites." EPA May 13th Letter at ¶ 8.

- The RH SIP is fixated on Selective Non-Catalytic Reduction ("SNCR") technology, and fails to seriously consider Selective Catalytic Reduction ("SCR) technology, which is not only a more cost-effective pollution control measure, ton-for-ton, than SNCR (<$2,000/ton NOx reduction via SCR versus <$3,700/ton NOx reduction via SNCR), but also a far more effective pollution control measure (the removal of 17,501 tons of NOx/year via SCR versus 4,900 tons of NOx/year via SNCR), and a measure premised on a more robust BART determination (0.05 lbs/MMBtu versus 0.23 lbs/MMBtu). EPA May 13th Letter at ¶ 9.

These are serious problems with the proposed RH SIP that cannot be remedied without further, careful analysis and review, including by the public. The Department has attempted to address EPA's May 13th letter with a supplemental filing dated May 20, 2011. However, this filing was hastily prepared, does not assuage the concerns raised by EPA, and is, at bottom, unpersuasive. At this time, we emphasize seven outstanding concerns, all of which compel rejection of the RH SIP.[3]

First, EPA's May 13th concerns should have been no surprise to the Department. The Department's efforts to propose an RH SIP have a long history, as outlined by EPA's January 5, 2011 Federal Register notice initiating the FIP process. 76 Fed. Reg. 491, 494-96 (Jan. 5, 2011) (outlining underlying regulatory history). Given this history, it is perplexing that the Department's prior submissions to the EIB would contain the deficiencies that necessitated EPA's May 13th letter and the Department's May 20th response in the first place. The

[3] These concerns should not be viewed as exhaustive; the conservation groups reserve their full rights to present, if necessary, further critiques of the proposed RH SIP, and the Department's justification for the proposed RH SIP, directly to EPA.

Department's RH SIP is a too-late, too-hasty effort to salvage state-level efforts that, fundamentally, do not ameliorate haze-causing pollution as required by law.

Second, the Department's May 20, 2011 supplemental filing asserts, relative to BART, that "[t]he fact that EPA's cost and removal efficiency estimates are different from NMED's is not relevant to or determinative of NMED's BART determination." Dept. Exh. 16, Response to EPA Comments of May 13th at 6. The Department proceeds to double-down on its determination that its proposal to use less-protective SNCR technology is justified by: (1) the Clean Air Act and BART Guidelines; and (2) a PNM Resources' February 11, 2011 analysis proffering ratepayer impact concerns. But the Department's response and underlying justification are far too flippant. It is, of course, EPA's perspective, as the expert agency expressly delegated the authority to review, approve, or reject New Mexico's RH SIP, that ultimately matters. 42 U.S.C. § 7410(c); *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837 (1984) (seminal decision by Supreme Court of the United States outlining framework providing deference to EPA). The Department, however, does not contend or even suggest why EPA's proposed SCR BART determination is wrong. Instead, the Department has stubbornly proceeded, with little basis, under the assumption that it is right. Given the lack of meaningful analysis or explanation justifying the Department's choice of data and analysis, this Board thus risks taking unlawful action if it adopts the Department's proposal.

Third, the Department's apparent reliance on PNM Resources' February 11, 2011 analysis to justify the rejection of SCR is a surprise. The Department, through the pre-filed written testimony of Mary Uhl, previously stated that "[t]he Department did not review the updated cost analyses for these control technologies [provided by the February 11, 2011 analysis] and does not necessarily agree with the new cost-estimates supplied in the analysis." Dept. Exh. 8c at 6, ll.10-17. The validity of these cost estimates is presumably critical to any conclusion regarding ratepayer impacts. It is therefore troubling that the Department has not independently reviewed and verified these cost estimates and, instead, has apparently adopted them, blindly, as a key basis for their decision to propose a weaker SNCR BART proposal for NOx. Indeed, it is arbitrary and capricious. *See, e.g., Utahns for Better Transp. v. Dept. of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (agency required to "verify the accuracy of information supplied by an applicant"); *S. Utah Wilderness Alliance v. Norton,* 237 F.Supp.2d 48, 53 (D.D.C. 2002) (agency violated law when it failed to independently analysis statements made by project applicants).

Fourth, the Department, by myopically fixating on ratepayer impacts, fails to consider the fact that EPA – which has proposed SCR as BART – has already considered, at least generally, economic costs and benefits. EPA has determined that RH protections will produce benefits "valued at $8.4 - $9.8 billion annually – preventing 1,600 premature deaths, 2,200 non-fatal heart attacks, 960 hospital admissions, and over 1 million lost school and work days," benefits that far outweigh estimated annual costs that nationally "range from 1.4 – 1.5 billion dollars."[4] The Department and PNM Resources' concern with

[4] www.epa.gov/visibility/fs_2005_6_15.html. The same pollutants that contribute to visibility impairment also harm public health. For example, fine particulates, PM2.5, are a major public health

ratepayer impacts is understandable, but it operates to elevate PNM Resources' narrow interest to the exclusion of New Mexico's broader public interest. It is therefore incumbent on the Department to consider not just ratepayer impacts – assuming *arguendo* that PNM Resources' analysis underling those proffered impacts can even withstand serious scrutiny and that ratepayer impacts are a valid consideration – but to complete an analysis of the full suite of economic costs and benefits of SCR versus SNCR technological controls to the people of New Mexico and the broader region.

The reason should be obvious: even if you can put aside ethics and morals, the public health impacts of air pollution cause serious economic impacts. People die and suffer from ill health caused by air pollution. Both of these factors reduce economic output. And the same pollutants that contribute to visibility impairment also harm public health. The fine particulates that cause regional haze, PM2.5, are a major public health concern because they can be inhaled deep into the lungs. Fine particulate can cause decreased lung function, aggravate asthma, and premature death in people with heart or lung disease. NOx, as well as other pollutants, such as VOCs, are precursors to ground level ozone, or smog. Ground level ozone is associated with respiratory diseases, asthma attacks, and decreased lung function.[5] Ozone concentrations in parks in the Four Corners region approach the current health standards,[6] and likely violate anticipated lower standards.[7] In fact, ozone levels in many parts of New Mexico, Colorado, and Utah are already in the range of ozone levels deemed harmful to human health.[8] These public health impacts are only exacerbated by

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concern as they can be inhaled deep in the lungs, causing decreased lung function, aggravation of asthma, and premature death in people with hard or lung disease. NOx and VOCs are also precursors to ground level ozone, or smog, which is associated with respiratory diseases, asthma attacks, and decreased lung function. Notably, ozone concentrations in the Four Corners region will likely violate revised and strengthened ozone standards that are likely in the near future.

[5] *See* http://www.nature.nps.gov/stats/index.cfm.

[6] Monitors in the Four Corners region have registered ozone concentrations within 5% of the level considered to be a violation of the ozone NAAQS. As of 2008, the fourth highest ozone concentrations in Zion and Canyonlands national parks each year have averaged 72 ppb and 71 ppb respectively. Mesa Verde National Park and Petrified Forest National Monument each had 3-year averages of the fourth high ozone concentrations of 71 ppb as of 2008. Monitors in Grand Canyon National Park and Farmington, New Mexico had a 3-year average of the fourth highest ozone concentration equal to 70 ppb as of 2008.

[7] On September 16, 2009, EPA announced that its reconsidering both primary and secondary ozone standards to ensure they are scientifically sound and protective of human health and welfare. See www.epa.gov/groundlevelozone. EPA will be reviewing the science that guided the 2008 decision as well as the findings of EPA's independent Clean Air Scientific Advisory Committee ("CASAC"), which unanimously recommended decreasing the primary standard to within the range of 0.060–0.070 ppm.

[8] *See* Clean Air Scientific Advisory Committee correspondence with EPA Administrator Stephen Johnson (Oct. 24, 2006) ("Clean Air Scientific Advisory Committees (CASAC) Peer Review of the Agency's 2nd Draft Ozone Staff Paper"). CASAC found that elevated ozone concentrations are associated with "an increase in school absenteeism; increases in respiratory hospital emergency department visits among asthmatics and patients with other respiratory diseases; an increase in

climate change, which is caused by the emission of carbon pollution from the production and combustion of fossil fuels, including at the SJGS. In New Mexico, this concern is heightened by the vast amounts of water used at SJGS, water that is precious in a state and region suffering from drought and struggling to protect water quality.[9]

Moreover, visibility is itself a key component of the recreation experience in our region's iconic Wilderness Areas and National Parks, and degraded visibility can therefore suppress the tourism that these iconic landscapes provide, tourism that is critical to New Mexico and the broader region's economy. For example, Utah's five Class I areas, all of which are national parks, generate a significant portion of this sustainable tourism economy: in 2008, these areas were responsible for 5.7 million recreation visits, over $400 million in spending, and nearly 9,000 jobs.[10] Parks attract businesses and individuals to the local area, resulting in economic growth in areas near parks that is an average of 1 percent per year greater than statewide rates over the past three decades.[11] National parks also generate more than four dollars in value to the public for every tax dollar invested.[12]

Such broader health, economic, and public interest considerations are well within the Board's purview and, indeed, core responsibilities pursuant to both the Clean Air Act and the Air Quality Control Act. *See* 42 U.S.C. § 7491(g)(2) (providing that, in making BART determinations, state mush consider not just the "costs of compliance," but "the energy and nonair quality environmental impacts of compliance"); NMSA §§ 72-2-5(E)(1)-(2) (providing for consideration of air pollution's interference with "health" and "welfare," as well as "public interest"). These considerations are particularly important with regard to the SJGS, a coal-fired power plant that has long externalized costs to the broader public and environment by, e.g., causing reduced visibility and associated public health impacts. These externalized costs should be addressed through a complete, comprehensive analysis of true, total economic costs and benefits. Given the absence of that analysis, the Department's attempt to justify SNCR as BART on, instead, the too narrow basis of the proffered

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hospitalizations for respiratory illnesses; an increase in symptoms associated with adverse health effects, including chest tightness and medication usage; and an increase in mortality (non-accidental, cardiorespiratory deaths) reported at exposure levels well below the current standard." Moreover, a recent study in the New England Journal of Medicine confirms that that long-term exposure to ozone increases the risk of death from respiratory causes. Jerrett, Michael *et al*., "Long Term Ozone Exposure and Mortality," NE J Medicine 2009; 360, 1085-1095. In a long-term study of nearly 500,000 participants, the study found a 4% increase in death for respiratory causes for every 10-ppb increase in exposure to ozone. The risk of dying from respiratory causes in the highest-ozone areas was nearly three times that in the lowest-exposure areas.

[9] http://drought.unl.edu/dm/DM_state.htm?NM,W (current New Mexico drought conditions).

[10] National Park Visitor Spending and Payroll Impacts, 2008. Daniel J. Stynes, Michigan State University, October 2009.

[11] http://web4.msue.msu.edu/mgm2/parks/MGM2System2008.pdf.

[12] Hardner and Gullison, "The U.S. National Park System, An Economic Asset at Risk" (November 2006) (www.npca.org/park_assets/NPCA_Economic_Significance_Report.pdf)

ratepayer impacts fails.[13]

Fifth, the Department's fixation on ratepayer impacts is misplaced. It is the Public Regulation Commission's ("PRC's") purview to quantify ratepayer impacts and establish utility rates. The Department, here, is asking this Board to, in effect, presume an expertise that it does not have. The Board, in considering the Department's proposal, should focus on air quality protection, not what is or is not an acceptable "ratepayer impact," especially since this Board does not have the statutory authority or expertise to make that determination. Such determinations are of course complex. For example, even if the PRC were to determine that SCR technology caused significant ratepayer impacts, this would not mean that SNCR technology was a good investment of ratepayer resources. Instead, the PRC could – and indeed should – determine that ratepayer resources are better invested in energy efficiency and clean, renewable energy technologies, thus supplanting coal-fired electricity from SJGS and quickening SJGS' retirement.[14] These investments, by more rapidly transitioning us away from dirty energy to efficiency and clean energy would, incidentally, better protect air quality, creating concomitant public health, environmental, and economic benefits.

Further, as discussed above, the Department has not completed a comprehensive economic analysis of costs and benefits, fixating, instead, on costs to PNM Resources and associated ratepayer impacts. To provide some additional context that reinforces our point, PNM is currently seeking a stipulated rate increase before the PRC that, by 2013, will amount to $150 million per year or more. Curiously, PNM Resources, in justifying this rate increase, did not claim that this amount – which amounts to approximately *$140 per year for the average residential customer* (versus the $82 per year PNM estimated for SCR in Appx. D to the 309(g) SIP) – was too much for ratepayers to absorb. NMPRC Case No. 10-00018-UT, PNM Exhibit 16 (Supp. Direct Testimony in Response to Bench Request of John D. Olmstead – Exh JDO-1).

Sixth, PNM Resources has estimated that its share of SCR costs would be $460 million.[15] EPA, in contrast, has estimated the <u>total</u> cost – not just PNM Resources' share – at

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[13] The Department cites Appendix D to the 309(g) SIP at page 36, paragraphs (5) and (6), to support its findings. But paragraphs (5) and (6) do not provide the full, true analysis of economic costs and benefits but, rather, simply fixate on a single issue, ratepayer impacts.

[14] This is particularly so because the SJGS is likely to face long-term challenges to ensure that its facilities and operations adequately protect air quality, water quality, public health, and the environment. For example, SJGS will likely have to better internalize the true costs of coal combustion, not just to address visibility, but, also, to address toxic air emissions (i.e., hazardous air pollutants), improved National Ambient Air Quality Standards for, e.g., ozone and fine particulate matter, anticipated protections for aquatic organisms impacted by cooling water intake structures provided by the Clean Water Act, 33 U.S.C. § 1326(b), effluent limitation guidelines provided by the Clean Water Act, 33 U.S.C. § 1311, and, potentially, coal ash waste pursuant to the Resource Conservation and Recovery Act (*see* 75 Fed. Reg. 35127 (June 21, 2010)).

[15] http://seekingalpha.com/article/268457-pnm-resources-ceo-discusses-q1-2011-results-earnings-call-transcript?find=PNM%2BQ1%2B2011.

a much less $247 million, which would, as we understand, put PNM Resources specific share at $125 million. 76 Fed. Reg. 491, 502. It is not clear whether or how the Department has compared and contrasted these competing figures and why it has decided, here, to choose PNM Resources' self-serving figures. This is particularly problematic because, as noted above, SCR technology is, on a per ton basis, a far less costly pollution control measure. It would be ill-advised to accept a less-efficient pollution control measure, SNCR, when the more efficient pollution control measure, SCR, will likely be far less costly than either the Department or PNM Resources has, to date, represented.

Seventh, it is not clear how the Department determined that SCR costs are "unacceptable." Just because SCR is more expensive than SNCR does not mean that its costs are actually "unacceptable" for purposes of compliance with the Clean Air Act and regional haze obligations. SNCR itself presents "unacceptable" costs externalized by PNM Resources to the public and, moreover, "unacceptable … non-air quality environmental impacts." BART Guidelines, 40 C.F.R. Part 51, Appendix Y. Fundamentally, to justify a determination that the costs of SCR BART are "unacceptable," the Department, to justify Board action regarding the far weaker SNCR BART, must provide a substantial basis in the record that properly balances air quality protection with economic costs and benefits, as well as non-air quality environmental impacts, as per BART Guidelines.

The Department, and by extension, the Board, cannot cherry pick one factor – the "costs of compliance" – and then narrow those "costs" to solely "ratepayer impacts," thereby excluding broader costs, the urgent need for strong air quality protection, and non-air quality environmental impacts. Unfortunately, it appears that this is precisely what the Department has done with its RH SIP and BART proposal, putting the Board in the position of taking unlawful action. Because we cannot discern any basis in the record that persuasively explains this necessary balancing and justifies the outcome of that balancing that alleviates our concerns, we are compelled to conclude that the Department's proposal reflects little more than "an exercise in form over substance . . . a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1145, 1142 (9th Cir. 2000).

b. The Department's SNCR Proposal Does Not Reflect the Best Available Retrofit Technology, SCR With a NOx Emissions Limit of 0.035 lbs/MMBtu

We anticipate that the Department and PNM Resources will unfairly disparage EPA's SCR BART proposal as too costly and draconian. But it is important to note that EPA's proposed BART NOx emission limit for SJGS of 0.05 lb/MMBtu is actually too lenient and not necessarily sufficient to comply with the Clean Air Act. As explained by Dr. Ranajit Sahu in comments submitted to EPA on April 5, 2011, EPA should be considering a lower NOx emission limit of 0.035 lbs/MMBtu as not only technically feasible – accounting for normal fluctuations in emission rates and control efficiency – but legally required for SJGS. *See* Exhibit A, Comments of Dr. Ranajit Sahu at 2, 41-42 (attached to the San Juan Citizens Alliance May 3, 2011 letter as "Exhibit 2" and hereinafter cited as "Sahu at ___"). To achieve this strengthened emissions limit only requires a relatively small, incremental investment compared to EPA's current proposal. Sahu at 43.

Several of Dr. Sahu's findings bear consideration by this Board in support of our position that SCR with a 0.035 lbs/MMBtu NOx limit should be required as BART and, therefore, that the Department's much weaker proposal of SNCR with a 0.23 lbs/MMBtu NOx limit, should be flatly rejected:

- Dr. Sahu found that there is room to improve emissions at SJGS through improved in-boiler controls, operations, and other actions. Sahu at 9-10. Providing additional margin beyond the current emissions limit of 0.30 lbs/MMBtu (on a 30-day rolling average) in this way would make it easier to comply with an SCR-based NOx limit of 0.035 lbs/MMBtu. Sahu at 9.

- Dr. Sahu explained that there are already "over 230+ SCRs … operating on coal-fired units in the [U.S.]" and that the type of coal is not necessarily a barrier to SCR. Sahu at 11, 14. Dr. Sahu proceeds to explain that "SCR catalyst vendors can easily guarantee at least 90% efficiency for SCR," including, specifically, for SJGS, which is a far greater level of efficiency than the Department's SNCR proposal. Sahu at 15; *see also* Sahu at 16-20 (providing support for SCR conclusions).

- Dr. Sahu concluded that the sulfur content of San Juan coal (0.73-0.77%) is relatively low and does not impede SCR use or create a concern for negative impacts to downstream equipment such as air heaters. Sahu at 13-14.

- Notably, Dr. Sahu, beyond justifying a SCR BART with a NOx emission limit of 0.035 lbs/MMBtu, also found that the cost analysis completed by PNM Resources "contained numerous errors and unsupported assumptions." Sahu at 43.

2. THE STATE OF NEW MEXICO SHOULD NOT, IN ITS ZEAL TO ASSIST PNM RESOURCES, UNDERCUT PUBLIC HEALTH AND ENVIRONMENTAL PROTECTIONS FOR NEW MEXICO AND THE BROADER REGION

EPA, as discussed, has already proposed to "promulgate a Federal Implementation Plan (FIP) to prevent emissions from [SJGS] from interfering with other states' measures to protect visibility and to implement nitrogen oxides (NOx) and sulfur dioxide (SO2) emission limits," "sulfuric acid (H2SO4) and ammonia (NH3) hourly emission limits at [SJGS] to minimize the contribution of these compounds to visibility impairment," and "to address the requirement for best available retrofit technology (BART) for NOx for [SJGS]." 76 Fed. Reg. 491, 491-93 (Jan. 5, 2011).[16] EPA is completing the FIP because it is required to do so pursuant to the Clean Air Act. 42 U.S.C. § 7410(c)(1). Moreover, EPA is subject to a

[16] It is New Mexico's failure to satisfy its Clean Air Act responsibilities that has necessitated EPA's work to complete the RH FIP and thereby protect New Mexico and the broader region's air quality and, by extension, the region's public health and environment. 42 U.S.C. § 7410(c)(1); 76 Fed. Reg. 491, 494-96 (Jan. 5, 2011) (outlining underlying regulatory history, beginning with 1997 NAAQS for 8-hour ozone and PM2.5, and New Mexico's failure to fully satisfy Clean Air Act requirements in the intervening 14 years).

federal consent decree mandating completion of the FIP by August 5, 2011.

Assuming that the State of New Mexico intends to actually protect air quality and ensure timely compliance with 42 U.S.C. § 7491(a), the State of New Mexico should welcome EPA's efforts. New Mexico would be in good company: the State of Colorado has recently submitted a letter in support of EPA's efforts, and both the U.S. Fish and Wildlife Service and National Park Service have already signaled its support for EPA's SCR BART proposal and rejected New Mexico's less-protective SNCR BART proposal. *See* Exhibit A (National Park Service letter, prepared in consultation with the Fish and Wildlife Service, attached as Exhibit 4 to the San Juan Citizens Alliance May 3, 2011 letter), Exhibit B (attached) (April 4, 2011 letter from State of Colorado to EPA). Unfortunately, the Department's proposal undermines EPA and weakens otherwise necessary public health and environmental protections afforded by the Clean Air Act for New Mexico and the broader region.

We are particularly troubled by the Department's elevation of politics over sound science and good policy in the public interest by, in effect, proposing the RH SIP that PNM Resources wants. EPA records evidence a far-too-cozy relationship between PNM Resources and the Department designed to pressure EPA to weaken pollution controls to serve PNM Resources' interests. Specifically, EPA records show coordinated pressure on EPA by PNM Resources and the Department in joint meetings with EPA on March 8, 2011, March 22, 2011, and March 29, 2011. *See* Exhibit C (attached). In fact, EPA even noted statements by Raj Solomon, the Deputy Secretary of the Environment Department, at the March 22nd meeting explaining that the driving force behind the Department's proposal was not science but, rather that "there was a new administration in New Mexico with a new Board and that the San Juan Generating Station (SJGS) BART determination had been revised from a determination that SCR was BART to one in which SNCR was BART." *Id*. at 3.

The Department, notably, does not appear to be alone in its elevation of politics over sound science and good policy. The State of New Mexico's Office of the Attorney General has apparently – and, if true, prematurely – agreed "to litigate a flawed EPA ruling if asked by Governor Martinez." Exh. C at 3.[17] This statement, quoted from a set of talking points attached to an email sent from Ernest C'Debaca, a lobbyist for PNM Resources, to Ryan Cangiolosi, Governor Martinez' Deputy Chief of Staff, should of course be confirmed by the Office of the Attorney General. And, while this statement is also crafted to suggest that such litigation will only take place *if* EPA's ruling is "flawed" and *if* Governor Martinez asks the Attorney General's Office to challenge EPA, the basic thrust of the message is quite clear: the State of New Mexico intends to carry PNM Resources' water at the expense of the public health and environment of New Mexicans and our regional neighbors.

[17] This document was obtained through an Inspection of Public Records Request submitted by San Juan Citizens Alliance on April 25, 2011 to the Office of the Governor seeking records and communications between the Office of the Governor, PNM Resources, the Department, the EIB, and EPA regarding both the Department's proposed RH SIP and EPA's FIP. Of note, this document itself speaks to the likely existence of additional records and communications regarding the RH SIP and RH FIP, but those records and communications, assuming they exist, were not produced.

Concerns that New Mexico agencies – which are supposed to represent the whole public interest – have elevated politics, and the interests of PNM Resources, over sound science and good policy in the public interests, are also apparent by a review of the history behind the Department's current proposal. Under the previous administration, on June 21, 2010 the Department submitted, on June 21, 2010, a proposed a BART determination for the SJGS for NOx and particulate matter. *See* Exhibit D (attached). The June 21, 2010 document states, "the Department has determined that BART for Units 1-4 for NOx is SCR plus sorbent injection and an emission rate between 0.03 and 0.07 lb/MMbtu." *Id*. at p. 33.

The EPA reviewed the Department's June 21, 2010 BART determination and found it to be "thorough and comprehensive." 76 Fed. Reg. 491, 498. As EPA further explained, "we drew heavily upon the NOx BART portion of that document, and used it to help inform our NOx BART determination for the SJGS." *Id*. But, after the administration changed in January 2011, the Department made a political about-face, ignoring its previous analysis and contradicting its previous findings – findings EPA had determined to be "thorough and comprehensive" – by advocating for SNCR, instead of SCR, thus proposing a nearly eight-fold increase in NOx emissions from as low as 0.03 lbs/MMBtu to .23 lb/MMBtu.

Even if the Departments proposal were not riddled by politics, it is difficult to conclude that NMED's proposed RH SIP – which, largely relies on the very same technological controls to control air pollution that EPA has already determined are inadequate – can satisfy the CAA. While New Mexico may be entitled to submit a new SIP to EPA for its consideration, it does not follow, especially given the late date, that EPA should give the RH SIP, which is deficient on its face, serious consideration. As noted, EPA is obligated, by law, to complete the RH FIP. 42 U.S.C. § 7410(c)(1). Therefore, in our view, New Mexico's pollution control resources are, at this juncture, far better spent working with EPA to ensure that the FIP, once it is completed, is fully and faithfully implemented.

At bottom, this Board should reject the Department's RH SIP and SNCR BART proposal and throw its weight behind EPA's FIP and SCR BART proposals.

Sincerely,

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Counsel for Dine CARE, Natural Resources Defense Council, New Energy Economy, New Mexico Sportsman, the Rio Grande Chapter of the Sierra Club, the Sierra Club, San Juan Citizens Alliance, and WildEarth Guardians

cc: Dr. Alfredo Armendariz, Regional Administrator, EPA Region 6

CERTIFICATE OF SERVICE

I certify that the foregoing comments were served by electronic mail on May 27, 2011 to:

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